No. 15360

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

MAUD L. ELFER,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

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JURISDICTION

Jurisdiction lay in the District Court under 28 U.S.C. 1345 and lies in this court under 28 U.S.C. 1291.

LEGAL STATUS OF FAMILY ALLOWANCES

This section is set out, not from the standpoint of argument, but simply to provide a readily under-

stood explanation of the status of Class F family allowances, a subject which has been the subject of little litigation, and will serve to clarify the Statement of the Case.

Historically, officers of the armed services have been "entitled" to be married, that is, upon marrying their *pay* remained the same as their bachelor opposite number but their *allowances* were increased. Where in bachelorhood they had been entitled to the money value of one ration (or to be furnished food in specie), upon marriage they became entitled to two rations. Similarly, as bachelors they were furnished in specie a room in barracks but upon marriage became entitled to larger, married quarters or, in the alternative, a fixed sum of money in lieu thereof. A similar rule prevailed as to enlisted men of the "first three grades", that is, (in the Navy) Chief Petty Officer, Petty Officer First Class and Petty Officer Second Class. These allowances were limited to the "first three grades" who were (rightly, or not) considered to be the mature career men of the enlisted corps.

The lower grades of enlisted personnel were not "entitled" to be married. The cognizance taken by the armed forces of such unauthorized marriages varied from time to time. In some cases the armed forces

took active disciplinary action, in some re-enlistment was denied, and in some the marriage was simply ignored. In any event, when a man of the "last four grades" married, the United States gave him no assistance and his family lived on his un-augmented salary.

This was the situation at the time of the Pay Readjustment Act of 1942, June 16, 1942 (56 Stat. 359), which provided in Section 9 (at 363) for pay of the enlisted grades and in Section 10 (at 364, line 8 *et seq*), "Each enlisted man of the first, second, or third grade, in the active . . . service of the United States having a dependent . . . shall . . . be entitled to receive . . . the monthly allowance for quarters authorized by law. . . ." The sums were fixed and the number of dependents had no bearing on them. No provision was made in this act for dependency allowances for the last four grades.

Seven days after the passage of the aforementioned act, on June 23, 1942, the Servicemen's Dependents Allowance Act of 1942 (56 Stat. 381) was passed. This provided in Section 101 (at 381), "The dependent . . . of any enlisted man of the fourth, fifth, sixth, or seventh grades . . . shall be entitled to receive a monthly family allowance. . . ." The remainder of the act was filled with detail which, for discussion purpose,

may be summarized as (a) the allowance was to be a sum sent to the dependent and composed of a compulsory deduction from the serviceman's pay, plus an augmentation by the United States, and (b) varied upward with the number of dependents.

One financial inequity became apparent in this law. Since the family allowances (56 Stat. 381) varied upward with the number of dependents, while the quarters allowance (56 Stat. 359) did not, it was possible for an enlisted man with several children to actually lose money by promotion to the first three grades for he would begin to draw the fixed allowance which might be, and frequently was, less than the variable allowance based on several children.

This led to an amendment in the Act of October 26, 1943 (57 Stat. 577), which provided (at 579), "An enlisted man who . . . is receiving . . . quarters [allowance] . . . may, at his option, . . . continue to receive such [quarters] . . . allowance or elect not to receive such montetary [quarters] allowance and to have his dependents become entitled to receive family allowance. . . ."

This amendment cleared the way for the enlisted man upon promotion to, *at his option*, continue his better financial position under the family allowance system rather than the quarters allowance which

would otherwise be in effect automatically. Against this background of law we must assess the facts in this case.

STATEMENT OF THE CASE

Appellee was at all times pertinent to this action the wife of a member of the armed forces during World War II. As such she was, during an early period, entitled to "Class F allowances" paid under the Servicemen's Dependents Allowance Act of 1942 (56 Stat. 381) and it is for the recovery of a later erroneous payment of similar money that this action was brought. Specifically, appellee was paid such allowances for a period of time before June 1943 at the basic (there being no children involved) rate of $50.00 per month and concerning such payments no question is raised. From June 1943 to and including May 1945 the payments continued and $1150.00 was paid to appellee during this period of time.

The last mentioned payments totaling $1150.00 were made in violation of law (Conclusion of Law III, R. 10) as the then-husband of the appellee had been promoted to a grade to which no such allowances pertained, quarters allowance being paid.

The then-husband of appellee drew (for all that the record reveals) his full pay and quarters allow-

ance during the latter period of time. The then-husband never exercised his option to waive quarters allowance pertaining to his grade and continued to have his dependent draw family allowance.

Appellee was between May 1945 and the commencement of this action divorced from the person (Kenneth Schlafer), whose service in the armed forces has been above referred to, and is now married to a man named Elfer, and it was under this name that the action was brought.

The United States seeks judgment against appellee separately and not as a member of a marital community under the laws of the State of Washington. The above recital as to divorce and re-marriage is not deemed significant legally but is set forth to resolve confusion in names, etc.

QUESTIONS ON APPEAL

Appellant contends that the District Court erred in:

I.

Holding that the erroneous payments in question were made solely to the marital community of defendant and her former husband and not to defendant separately.

II.

Holding that payments made in error and in violation of law were made as compensation for military services and constituted community income.

III.

Holding that Kenneth Schlafer was a necessary and indispensable party to the action and in dismissing the action for failure to join said Kenneth Schlafer.

ARGUMENT AND AUTHORITIES

I.

In arguing that the erroneous payments were made to the wife (appellee) and not to the marital community and therefore a separate judgment should be rendered against the wife, we have been unsuccessful in finding authority. We proceed on what we consider to be a logical basis, to wit:

a. The intention of the donor is material in ascertaining the identity of the donee if an ambiguity exist. Family allowances are a gift or gratuity. The intended donee is the dependent. Under Washington law a gift to the wife is her separate property. Therefore, even had these payments been lawful, the wife received them as her separate property.

b. If overpayments were made, an implied contract to repay arose.

c. Any obligation of the wife to repay is her separate obligation.

d. Even if the wife received such payments on behalf of the community, she has a separate obligation to repay as an agent.

In support of the above reasoning we offer:

a. What was the intention of the United States? It was clearly to make a gratuitous payment *to the dependent* of the military man. Portions of the pertinent law (56 Stat. 381) are quoted:

> "Sec. 101. The dependent . . . shall be entitled to receive a monthly family allowance . . . .
>
> "Sec. 102. The . . . allowance . . . shall consist of the *Government's contribution* [Italics supplied] to such allowance and the reduction in or charge to the pay of such enlisted man.
>
> "Sec. 115. The . . . allowances . . . shall not be assignable; shall not be subject to the claims of creditors of any person to whom or on behalf of whom they are paid . . . ."

The very title of the act states as its purpose "To provide family allowances *for the dependents* [Italics supplied] of enlisted men of the . . . Navy . . . ."

It could scarcely be clearer that the United States intended to make the relationship one between the

donor and dependent-donee. This becomes even clearer when the act relating to allowances for the first three grades is read in parallel. That act, passed by the same Congress *seven days earlier* said (56 Stat. 359 at 364) that a *first three grader* with dependent should be entitled to extra money. Instant act said that *dependents* of last four graders should be entitled to money. It should be beyond question that family allowances were paid to the dependent by the sovereign and the military man's only connection with the matter was a concurrent deduction from his pay.

By the same token, the United States did not impose an income tax on the Government's contribution to the family allowance, considering it "in the nature of a gift by the Government." Internal Revenue Cumulative Bulletin 1942 - 2, page 53. Clearly all indications of intention on the part of the donor, United States, show that such payments were gifts to the receiving dependent.

The Ninth Circuit case of *Hatch* v. *Ferguson* (D.C. - Wash., 1895), 68 Fed. 43, is somewhat in point here. The court construed the Washington community property status of a land-grant for service in the Mexican War. It was held to be separate property, having been donated by reason of service while a single man, but it was said in dictum (at 49), "But, even

if the marriage . . . had taken place [earlier] . . . The warrant was a gift, and, as such, was the separate property of the donee . . . ."

To a like effect see *Johnson* v. *Johnson* (Texas), 23 S.W. 1022 (1893), where the court said "but our holding is put on the ground that the pension is purely a gift from the government, and as such is separate property . . . ."

It would appear, therefore, that *gratuities* by the United States *on account of service* are separate property although *payments for service* may be community property.

Washington law (R.C.W. 26.16.020) provides: "The property . . . of every married woman . . . acquired by gift [shall be her separate property] . . . ."

b. It being established without contest that there were overpayments by mistake, it follows that an implied contract to repay arose, 4 Am. Jur., *Assumpsit*, § 20 and § 24.

c. It necessarily follows that such an implied contract has, as its obligor, the person who received the money, to wit, the dependent.

d. Even if it be held that appellee received the overpayment in question as the agent of the then marital community, it does not relieve her of responsibility

for repayment. The vast preponderance of community property cases deal with an attempt to impose liability on the marital community for the act of one of the spouses. This is quite natural for in community property states it is all too often the case that one of the spouses has committed an act which clearly imposes liability on him. He has no separate income, however, and if the plaintiff is to recover at all, he must *additionally* impose a liability on the community. Hence the never-ending struggle by counsel and the courts to find some benefit to the community from the act which may result in imposing such liability. But we must not lose sight of the fact that this community liability is *in addition to* the liability of the obligor or tort-feasor member of the community. To put it another way appellant feels that there is no such thing as *pure community liability* in tort or contract. It can only arise because there is also an individual liability on the part of a community member (normally the husband) which is passed along to the community under either the rule of *respondeat superior* or agency. While the expression "agent of the community" is used many times in the law of community property, it should be noted that the agent relationship is not quite that of an agent who functions separately from his principal. In community property, the agent (more normally the husband) is the agent for the community because he is a member

of the community. In a very limited sense he acts as one of a partnership.

In this sense Mrs. Elfer may be said to have received the overpayments without authority. The community/partnership could not, of course, give her authority to receive money paid in violation of law. The fact that she may afterward have used such money for a community purpose cannot avoid her personal, separate liability to repay the same. Were the marital community still in existence, the appellant might have an additional party defendant available on the theory of participation in benefits. But this can in no way limit appellant's rights against the basic obligor on the contract to repay, the appellee herein.

Indicative of the state of the law on this point is that we have not found any case under the laws of Washington paralleling the contention of appellee in this case, *i.e.*, that the wife's personal separate liability, if it exist, becomes merged into that of the community to the extent that she is personally exonerated.

R.C.W. 26.16.170 states, "Contracts may be made by a wife, and liabilities incurred, and the same may be enforced by or against her to the same extent and in the same manner, as if she were unmarried." We find no reason for excepting an implied contract to return money from this general rule.

Most of the cases decided under this statute and its predecessors have dealt with written contracts to which the wife's name was signed. They cause little difficulty, the courts holding universally that the signing of the separate name evinced an intention to become separately liable, *e.g.*, *Karatofski* v. *Hampton*, 135 Wash. 139, 237 Pac. 17 (1925).

We are mindful, however, that here we deal with an implied contract for the return of money had and received and while we see no reason for differentiating such a case from a written contract, we turn to the case of *Paccos* v. *Rosenthal*, 137 Wash. 423, 242 Pac. 651 (1926), which we believe to be in point.

One Paccos loaned Rosenthal a sum of money for Rosenthal's cash bail. Later Rosenthal succeeded in getting Mr. and Mrs. Carroll to furnish a surety bond for him and, instead of returning the cash to Paccos, he turned it over to the Carrolls. When the sureties were exonerated, Paccos demanded the return of the cash from Rosenthal and the Carrolls and sued them. He obtained judgment, in addition to others, against Mrs. Carroll *personally* and on the appeal, the court said (at 425), "The objection that no personal judgment should have been entered against Mrs. Carroll, we likewise think is not well taken. She obligated herself personally on the bonds, and it was through

the means of these that the money was obtained. If it is the property of [Paccos], and if it has not been returned to him by [Carrolls], . . . she is personally responsible for its loss to the respondent."

Analysis of the above case shows that it was clearly a cause for money had and received and that no written promise by Mrs. Carroll to pay Paccos was involved. Yet a separate, personal judgment lay against her.

Again the language of *Lumbermen's National Bank* v. *Gross*, 37 Wash. 18, 79 Pac. 470 (1905), seems apt. A married woman signed a note for a community debt and the court said (at 23), "Under the law of this state, a married woman has full liberty of contract. In order to bind her separate property, it is not necessary that she should enter into a specific agreement to that effect or for that purpose."

In *Werker* v. *Knox*, 197 Wash. 453, 85 P. 2d 1041 (1938), judgment was entered against a wife *and* the marital community for a tort committed by the wife. The court based its reasoning in deciding whether it was a community tort or not on the nature of Mrs. Knox's errand when the tort occurred and said (at 462): ". . . the evidence that she intended to pay for the sweater out of that allowance falls short of proving that she had entered into a personal contract bind-

ing upon herself alone. The trial court found that Mrs. Knox was on a community errand." The Supreme Court affirmed the separate and community judgment.

Enough has been said we feel to make it clear that when a wife becomes obligated on an implied contract to repay money had and received, the mere fact that the marital community of which she is (or was) a member may *also* be obligated does not exonerate her separate liability.

II.

The court held (R. 10, line 9 *et seq*) that the payments in question were made ". . . as compensation in part for the military services of the said Kenneth Schlafer . . . ." We are completely at a loss to understand how this holding can stand alongside the holding (R. 10, line 18 *et seq*) that such payments were made ". . . in violation of law . . . [as] no such family allowance entitlement appertained." To state that a person is not entitled to a payment of money and in the same document recite that it is "compensation . . . for . . . services . . . ." is simply confusing and contradictory.

Appellant is aware that there is a line of cases (with which we do not agree) holding that such payments are family income but we hasten to point out

that all three cases which counsel have found, to wit: *Sterrett* v. *Sterrett* (Texas), 228 S.W. 2d 341 (1950); *Kipping* v. *Kipping* (Tenn.), 209 S.W. 2d 27 (1948); and *Hokenson* v. *Hokenson*, 23 Wash. 2d 908, 162 P. 2d 592 (1945), differed materially from this one in that (a) they were all divorce cases involving only the rights of husband and wife and not third parties, (b) all were concerned with the disposition of money *lawfully* paid to the wife, not, as here, where the payment was in violation of law and recoverable *ab initio*, and (c) the trial court under Washington law, at least, has the disposition of *all* property of *both* spouses before it, and could only be reversed for manifest abuse of discretion. Their language, we submit, was persuasive of the proposition that family allowances are family income and the unlawfulness in this case was overlooked by the trial court.

III.

Appellee pleaded in her Third Affirmative Defense (R. 6) that Kenneth Schlafer was indebted jointly with appellee, if appellee were indebted at all. The court found (R. 9) that Kenneth Schlafer still resided within the jurisdiction of the court and concluded (R. 10) that, for non-joinder of parties defendant, the action should be dismissed. It was not specifically stated whether Kenneth Schlafer was con-

sidered a necessary or indispensable party or both. We assume that the court must have felt Kenneth Schlafer to be an indispensable party for if he was considered only a necessary party, the court failed to follow Federal Rule of Civil Procedure 19(b) which states, in part, "When persons who are not indispensable, but who ought to be parties . . . are subject to the jurisdiction of the court . . . the court shall order them summoned to appear in the action." The proper remedy for a necessary party, if the court deemed him such, was, of course, simply to order him summoned and joined.

Schlafer could not be considered an indispensable party, on the other hand, under the rule of *Barney* v. *Baltimore*, 73 U.S. 280, 18 L.Ed. 825, 6 Wall. 280 (1867), which holds that all parties to a partition suit are indispensable and must be before the court. The court goes on to state that an act of 1839 (quoted at 281 and very similar to Rule 19) does not apply to a partition suit, but says that it does apply to an action against joint debtors for (at 287) ". . . the plaintiff, by his judgment against one of his joint debtors, gets the relief he is entitled to, and no injustice is done to that debtor, because he is only made to perform an obligation which he was legally bound to perform before. The absent joint obligors are not injured, be-

cause their rights are in no sense affected, and they remain liable to contribution to their co-obligor . . . ."

The Second Circuit held to the same effect in *Greenleaf* v. *Safeway Trails, Inc.* (C.A.-2d; 1944), 140 F. 2d 889, when construing our modern Rule 19. The court expressed doubt that Rule 19 applied to joint obligors at all but said that if it did, the remedy was to call in the absent defendants—not dismiss the action.

It would therefore appear that the most appellee was entitled to in the state of the pleadings was a finding of joint indebtedness and compulsory joinder of Kenneth H. Schlafer. Appellant denies in other parts of this brief that there was such joint indebtedness but, assuming, without conceding, that there was, the court erred in dismissing.

A careful reading of Washington case law reveals many dismissals where a plaintiff served one member of the community and sought in the suit to hold the community liable. They fail to reveal any instance where the rule was applied in reverse, as it was here, *i.e.*, the dismissal of an action against one person on the allegation by the defendant that the community ought to be a party and the other spouse had not been joined.

CONCLUSIONS

For the foregoing reasons we respectfully submit that the case should be reversed and remanded to the District Court with instructions to:

a. Enter judgment for plaintiff and against defendant Maud Elfer in the event that the Court of Appeals determines this to be a separate obligation of Maud Elfer, or

b. Reopen proceedings and order Kenneth Schlafer summoned before the District Court in the event that the Court of Appeals finds the said Kenneth Schlafer to be a necessary party to the proceedings.

Respectfully submitted,

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